

Appendix E

Programmatic Agreement

**Programmatic Agreement
Among the
Federal Highway Administration
Bureau of Indian Affairs
Navajo Nation Tribal Historic Preservation Officer
Utah State Historic Preservation Officer
and
Utah Department of Transportation
Regarding the Section 106 Process for the
SR-262; Montezuma Creek to Aneth Project
UDOT Project No. STP- 0262(8)23E**

WHEREAS, the Federal Highway Administration (FHWA), the Navajo Nation, and the Utah Department of Transportation (UDOT) propose to reconstruct 8.3 miles of State Route (SR) 262 (now known as SR-162) between the towns of Montezuma Creek and Aneth, Utah (hereafter referred to as the Project); and

WHEREAS, FHWA is designated the Lead Federal Agency for the purposes of Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended (16 U.S.C. 470f), and its implementing regulations (36 CFR Part 800); and

WHEREAS, the Project is likely to have an effect upon historic properties, FHWA has elected to comply with the NHPA through execution and implementation of a Programmatic Agreement (Agreement) pursuant to 36 CFR § 800.14(b)(3); and

WHEREAS, the FHWA has established the Project's area of potential effects (APE), as defined in 36 CFR § 800.16(d), as 150 feet either side of the SR-162 centerline for direct construction impacts and an area 0.5 mile either side of the SR-162 centerline for potential indirect effects that might alter the setting or environment of historic properties, as shown in Attachment 1 [map]; and

WHEREAS, FHWA has consulted with the Navajo Nation Tribal Historic Preservation Officer (THPO) and the Utah State Historic Preservation Officer (SHPO) and they are participating as Signatories to this Agreement; and

WHEREAS, because of the possible need for new roadway right-of-way on Navajo Nation land that would require the Bureau of Indian Affairs (BIA) to comply with the NHPA, the BIA intends to satisfy compliance with the NHPA by participating as a Signatory to this Agreement; and

WHEREAS, FHWA has invited the Advisory Council on Historic Preservation (Council) to participate in consultation, and the Council has chosen not to be a signatory to this Agreement; and

WHEREAS, UDOT is the state transportation agency coordinating the Project on behalf of the FHWA, has participated in the consultation, and is an Invited Signatory to this Agreement; and

WHEREAS, portions of the Project are located within lands under the jurisdiction of the State of Utah and under the management of the Utah School and Institutional Trust Lands Administration (SITLA), the FHWA requests SITLA's participation as a concurring party to this Agreement; and

WHEREAS, pursuant to Section 101(d)(6)(B) of the NHPA and 36 CFR § 800.2(c)(2)(ii), FHWA has consulted with the Hopi Tribe, the Pueblo of Zia, the Pueblo of Acoma, the Pueblo of

Laguna, the Pueblo of Zuni, the Pueblo of Jemez, the Paiute Indian Tribe of Utah, the Southern Ute Tribe, the Ute Indian Tribe of the Uintah-Ouray, Utah, the Ute Mountain Ute Tribe, and the White Mesa Ute Council (hereinafter referred to as Tribes); and has invited those Tribes expressing an interest in the Project to concur in this Agreement, with the further understanding that, notwithstanding any decision by these Tribes to decline concurrence, FHWA shall continue to consult with these Tribes throughout the implementation of this Agreement; and

WHEREAS, portions of the Project are located within the Navajo Nation Reservation where the Navajo Nation Cultural Resource Protection Act (CMY-19-88) ensures the protection of cultural properties of the Navajo Nation by requiring the approval of the THPO prior to the implementation or authorization of an undertaking, and the FHWA has consulted with the THPO in accordance with 36 CFR Part 800 and CMY-19-88; and

WHEREAS, portions of the Project are located on private lands under the jurisdiction of the State of Utah for the purposes of consultation under 36 CFR Part 800, the FHWA has consulted with the SHPO in accordance with 36 CFR Part 800; and

WHEREAS, FHWA has involved and will continue to involve the public, the Tribes, and interested parties as stipulated under the National Environmental Policy Act (NEPA) of 1969, as amended, and the NHPA in a manner consistent with UDOT's public involvement procedures; and

NOW, THEREFORE, the FHWA, THPO, SHPO, BIA, and UDOT agree that upon FHWA's decision to proceed with the Project, FHWA shall ensure that the following stipulations are implemented in order to take into account the effects of the undertaking on historic properties:

STIPULATIONS

The FHWA shall ensure that the following stipulations will be carried out:

I. UDOT Acting on Behalf of FHWA

- A. FHWA consents to allow UDOT to act on its behalf in consultations with the THPO, the SHPO, and consulting parties in the identification and evaluation of historic properties (36 CFR § 800.4), the assessment of adverse effects (36 CFR § 800.5), and the resolution of adverse effects (36 CFR § 800.6).
- B. FHWA remains responsible for the outcome of the consultations UDOT undertakes on FHWA's behalf.
- C. FHWA is responsible for conducting government-to-government consultation with the Tribes. UDOT may assist in that consultation.

II. Identification of Historic Properties

- A. UDOT shall ensure that an intensive pedestrian cultural resource survey of the 300-foot APE for construction impacts is completed to identify archaeological and historical resources. The pedestrian survey transect interval shall not exceed 15 meters.
 - 1. All previously recorded sites will be revisited, re-evaluated, and an updated site form completed. If a site cannot be relocated, a brief description of the re-location efforts and possible reasons (destroyed, mis-plotted) for not

finding a site will be presented. If the site was mis-plotted, destroyed or is actually out of the Project APE, an update to the site form will be completed stating that.

2. All prehistoric and historic sites on lands under the jurisdiction of the Navajo Nation will be recorded on Navajo Nation Archaeological Site Recording Forms. The cultural resources contractor for the Project shall obtain permanent site numbers from the NNHPD and shall submit the final approved site forms to the NNHPD. Permanent site numbers shall then be used in all final reports prepared pursuant to the requirements of this Agreement.
 3. All prehistoric and historic sites on any other lands will be recorded on Intermountain Antiquities Computer System (IMACS) inventory forms.
 4. UDOT shall ensure that the goals, methods, and results of the field survey are documented in a report consistent with NNHPD and SHPO standards. The reports shall include recommendations regarding the eligibility of identified cultural resources for the National Register (based on appropriate historic contexts as defined in *National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation* and *National Register Bulletin 16: How to Complete the National Register Registration Form*).
- B. UDOT shall ensure that a study of traditional Navajo cultural resources is conducted within the 300-foot APE, and traditional Navajo cultural resources are recorded on the Navajo Nation Traditional Cultural Property forms. Any information determined to be confidential by the NNHPD shall not be distributed for review by others. UDOT shall ensure that the draft report without confidential information of traditional Navajo cultural resources is reviewed, revised, and distributed pursuant to Stipulation VI.
- C. FHWA with the assistance of UDOT shall consult with the other Tribes to determine if they consider any cultural resources within the APE as having religious and cultural significance for their communities. Any resources identified by consulting Tribes will be recorded as sites on the appropriate form depending on land jurisdiction. Any information identified as confidential by a consulting Tribe will not be distributed for review by others. Otherwise, UDOT shall ensure that the draft report without confidential information of tribal resources is reviewed, revised, and distributed pursuant to Stipulation VI.
- D. UDOT shall ensure that the report of the survey results is reviewed, revised, and distributed pursuant to Stipulation VI. The report will include maps showing sites and will contain a table including at minimum the site number, site description, land status, and recommendations of eligibility

III. Determinations of Eligibility

- A. Based on review and comments provided in response to Stipulation VI, UDOT shall seek consultation on National Register eligibility determinations with the THPO for resources on the Navajo Nation, and with the SHPO for resources on other lands.

- B. If UDOT and the THPO or SHPO disagree on a determination, FHWA will consider the views of UDOT and the THPO and SHPO in making its determination.
- C. If the THPO or SHPO do not concur with the FHWA eligibility determination, FHWA shall submit the required documentation to the Keeper of the National Register for a formal determination of eligibility.

IV. Effects Assessment

After preliminary engineering designs for the Project are completed, UDOT, in consultation with the parties to this Agreement, shall apply the criteria of adverse effect (36 CFR § 800.5(a)) to National Register-eligible properties located within the APE. A field meeting will be held to provide an opportunity for the Agreement signatories and invited signatories, Tribes, and other consulting parties to visit sites and review draft eligibility determinations and findings of effect, and to discuss preliminary treatment of affected sites.

V. Resolution of Adverse Effects

- A. UDOT will make a reasonable effort to avoid historic properties identified within the APE. For historic properties that cannot be avoided, UDOT will make reasonable efforts to minimize project impacts. For historic properties that are impacted, FHWA proposes to resolve adverse effects by implementing a historic properties treatment plan (HPTP). UDOT shall ensure that a draft historic properties treatment plan (HPTP) is developed to resolve any identified adverse effects or effects determined to be not adverse. The HPTP shall describe the affected properties and their historic values, and identify the nature of the effects on those properties. UDOT shall consider options for avoiding or reducing adverse effects through design modifications. The HPTP shall describe any strategies for protecting historic properties in place (which might include fencing or monitoring during construction), as well as measures to mitigate unavoidable effects.
- B. The HPTP will identify areas to be monitored by a qualified archaeologist (a person meeting the *Secretary of the Interior's Professional Qualifications Standards* for archaeology, history, or architectural history, as appropriate (48 FR. 44739), and qualifications required by applicable permits during construction excavation, if any such monitoring is needed.
- C. The HPTP will stipulate that UDOT will ensure the commitments for avoidance of historic properties are met during construction by having the protected sites marked for avoidance and regularly inspected by a qualified archaeologist under the direction of the UDOT NEPA/NHPA Specialist.
- D. The HPTP shall include procedures for addressing any unexpected discoveries made after consultation is complete and/or during construction, including Native American remains and funerary objects.

- E. The HPTP shall be consistent with the *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation*, as amended and annotated (http://www.cr.nps.gov/local-law/arch_stnds_0.htm).
- F. UDOT shall ensure that the draft HPTP is reviewed, revised, and distributed in accordance with Stipulation VI.
- G. Many of the historic properties that could be adversely effected by the Project are likely to be eligible for the National Register because of their potential to yield important information (Criterion D), and treatment is likely to focus on recovering and preserving that data before those sites are disturbed. At a minimum, any data recovery plans developed to resolve adverse effects to eligible historic properties shall specify:
1. The properties or portions of properties to be investigated,
 2. Any properties or portions of properties to be destroyed without data recovery;
 3. Research questions, to be addressed, with an explanation of their relevance and importance,
 4. Fieldwork, analytical, and data management methods to be used, with an explanation of their relevance to the research questions,
 5. The level of effort to be expended on each property, including a rationale for any proposed sampling,
 6. A plan for disseminating the results to professional audiences, including a proposed schedule of reports,
 7. A plan to reach out to the public to include their participation in order to explain the purpose of the Project and investigations to resolve Project adverse effects and to disseminate the results to the general public,
 8. Procedures for treating Native American remains and cultural objects pursuant to Stipulation VII,
 9. Arrangements for curating collected artifacts and records in accordance with regulations for *Curation of Federally-Owned and Administered Archaeological Collections*, 36 CFR 79, except for human remains and cultural objects addressed in accordance with Stipulation VII,
 10. Qualifications of proposed management and field supervisory personnel, and
 11. A schedule for completing the activities specified in the data recovery plan.
- H. Some historic properties that may be adversely affected may have historical values other than information potential. If so, the HPTP shall define appropriate measures to avoid, reduce, or mitigate those impacts. These measures might include compilation of historic documentation or various other treatments.

Treatment of any traditional cultural properties should be designed in consultation with the traditional communities who value those resources.

- I. The HPTP shall be implemented prior to any Project activities that might affect National Register-eligible properties. UDOT shall ensure that a draft report documenting the goals, methods, and results of implementing the HPTP is prepared, and reviewed, revised, and distributed in accordance with Stipulation VI.
- J. If necessary to accommodate the Project construction schedule, UDOT shall ensure that a preliminary report is prepared to document that the fieldwork phase of the HPTP has been completed. If UDOT, after consulting with the other signatory parties, concludes that the fieldwork phase of the HPTP has been satisfactorily completed, UDOT shall authorize ground disturbing activities within portions of the APE where the data recovery plan has been completed on National Register-eligible properties, except in any properties identified in the HPTP for protection and preservation in place.

VI. Reporting Requirements and Review Procedures

Plans and reports prepared in accordance with this Agreement shall be consistent with guidelines of the Secretary of the Interior, THPO and SHPO, and any other permitting authorities. UDOT shall ensure draft documents prepared in accordance with this Agreement are submitted to the parties of this Agreement for a 30-day review period. The UDOT shall consider any comments provided within 30 days, and request the parties responsible for the documents to make appropriate revisions in response to the comments. The UDOT shall provide the parties to this Agreement a copy of all final documents. If any reviewing party fails to submit written comments within 30 days of receipt of the documents, the UDOT may assume they have no objection to the adequacy of the documents, unless the reviewing party has requested, in writing, an extension of the review period. If the review period is extended, all parties to this Agreement will receive the same extension.

VII. Treatment of Human Remains and Cultural Objects

It is likely that any human remains encountered in this project will be Native American. UDOT shall ensure that any human remains and grave-associated objects encountered are brought to the immediate attention of the FHWA, THPO, SHPO, the Tribes, and other consulting parties, as appropriate. Notification will be within twenty-four (24) hours of discovery. The treatment of Native American and other human remains and any funerary objects, sacred objects, or objects of cultural patrimony (cultural objects) found within the APE on the Navajo Nation, including UDOT right-of-way easements, shall be treated pursuant to the Navajo Nation Policy for the Protection of Jishchaá: Gravesites, Human Remains, and Funerary Items. Native American remains and funerary objects found on Navajo Nation land are also subject to the Native American Graves Protection and Repatriation Act. Human remains and funerary objects found on state land shall be treated pursuant to the Utah Native American Graves Protection and Repatriation Act of 1992 (U.C.A. 9-9-401, *et seq.*, and its implementing Rule R230-1). Details on the procedures for notification of discoveries, handling of human remains within the laws

mentioned above, security, and other details identified in Tribal consultation, will be set forth in the HPTP.

VIII. Confidentiality

Certain information about cultural resources, including locations, shall be confidential and distribution shall be restricted pursuant to Section 304 of the NHPA (16 U.S.C. 470w-3(a)-(c)), and Section 9 of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-mm), as amended.

IX. Permits and Professional Qualifications

- A. UDOT shall ensure that the cultural resources activities and reports associated with this Project are conducted pursuant to required permits from the NNHPD, Archaeological Resources Protection Act permits, and Utah Antiquities Act.
- B. UDOT shall ensure that the cultural resources activities prescribed by this Agreement shall be conducted by or under the supervision of a person or persons meeting the *Secretary of the Interior's Professional Qualifications Standards* for archaeology, history, or architectural history, as appropriate (48 FR. 44739), and qualifications required by applicable permits. This stipulation is not intended to preclude any party qualified under the terms of this paragraph from using the services of properly supervised persons who do not meet those standards.

X. Changes During Construction

Minor changes during construction are often necessary, such as to acquire and distribute fill material efficiently. If the proposed change is within the advertised construction limits for the Project and does not impact any historic properties eligible for the National Register, then the UDOT NEPA/NHPA Specialist will review and approve such changes with no further consultation with the Agreement signatories or other consulting parties.

If the proposed changes are outside the advertised construction limits, the UDOT NEPA/NHPA Specialist will review the changes and determine if additional investigations are warranted. The UDOT NEPA/NHPA Specialist will consult with the Agreement signatories and other consulting parties on a proposed course of action.

XI. Monitoring the Agreement

The Council, THPO, SHPO, BIA, and SITLA may monitor activities carried out pursuant to this Agreement, and the Council will review such activities if so requested. The UDOT and FHWA will cooperate with the Council and signatories in carrying out their monitoring and review responsibilities.

XII. Amendments

Any signatory to this Agreement may request that it be amended by informing the FHWA in writing of the reason for the request and the proposed amendment language. FHWA shall inform the other signatories of any proposed amendments and request their views.

FHWA shall consult with the signatories to consider such an amendment. 36 CFR § 800.6(c)(7) shall govern the execution of any such amendment. Any amendment shall be effective on the date an amendment is signed by all signatories. FHWA shall ensure that a copy of any executed amendment is filed with the Council.

XIII. Dispute Resolution

Should any party to this Agreement object in writing within 30 days to any actions proposed or carried out pursuant to this Agreement, FHWA shall notify the THPO or SHPO, as appropriate, and consult with the objecting party to resolve the objection. If FHWA determines that the objection cannot be resolved, FHWA shall forward all documents relevant to the dispute to the Council, and inform the other signatories of the status of the dispute. Within 30 days of receipt of all pertinent documentation, the Council shall:

- Provide recommendations the FHWA shall take into account in reaching a final decision regarding the dispute; or
- Notify FHWA that it will comment pursuant to 36 CFR 800.7(c), and proceed to comment. FHWA shall take into account any Council comments pursuant to 36 CFR 800.7(c)(4) with reference to the dispute.

Should the Council not exercise one of the foregoing options within 30 days after receipt of all pertinent documentation, FHWA may assume the Council's concurrence in its proposed response to the objection and proceed to implement that response. Any recommendation or comment provided by the Council shall be understood to pertain only to the subject of the dispute. The responsibility of FHWA to carry out all actions under this Agreement that are not the subject of the dispute shall remain unchanged.

XIV. Duration of Agreement

This Agreement is effective for ten years from the date of execution. UDOT shall review this Agreement prior to initiating construction on any portion of the Project, and will identify any of the stipulations that have not yet been implemented.

XV. Termination

In the event the UDOT does not carry out the terms of this Programmatic Agreement, the FHWA will comply with 36 CFR 800.4 through 800.6 with regard to the Project covered by this Agreement. Any signatory may terminate the Agreement by providing 30 days notice to the other parties, provided that the parties will consult prior to termination to seek agreement on amendments or other actions that would avoid termination. If an agreement on an amendment cannot be reached, FHWA may terminate the Agreement pursuant to 36 CFR 800.6(c)(8). FHWA shall either execute a new Agreement under 36 CFR 800.6(c)(1) or request and consider the comments of the Council pursuant to 36 CFR 800.7(a).

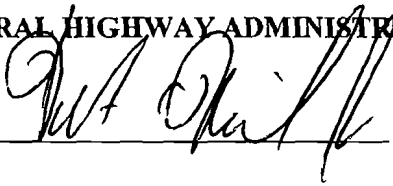
XVI. Effective Date

This Agreement shall take effect on the date that it has been executed by FHWA, THPO, SHPO, BIA, and UDOT.

EXECUTION of this Agreement and implementation of its terms is evidence that FHWA has satisfied its Section 106 responsibilities for the Project and any individual undertakings comprising the Project.

SIGNATORIES:

FEDERAL HIGHWAY ADMINISTRATION

BY:  DATE: 9/24/07
TITLE: _____

NAVAJO NATION HISTORIC PRESERVATION DEPARTMENT

BY: _____ DATE: _____
TITLE: _____

UTAH STATE HISTORIC PRESERVATION OFFICER

BY: _____ DATE: _____
TITLE: _____

BUREAU OF INDIAN AFFAIRS

BY: _____ DATE: _____
TITLE: _____

INVITED SIGNATORY:

UTAH DEPARTMENT OF TRANSPORTATION

BY: _____ DATE: _____
TITLE: _____

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SIGNATORIES:

FEDERAL HIGHWAY ADMINISTRATION

BY: _____ DATE: _____

TITLE: _____

NAVAJO NATION HISTORIC PRESERVATION DEPARTMENT

BY: Alan Brown DATE: 7.15.07

TITLE: NHHPD

UTAH STATE HISTORIC PRESERVATION OFFICER

BY: _____ DATE: _____

TITLE: _____

BUREAU OF INDIAN AFFAIRS

BY: _____ DATE: _____

TITLE: _____

INVITED SIGNATORY:

UTAH DEPARTMENT OF TRANSPORTATION

BY: _____ DATE: _____

TITLE: _____

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SIGNATORIES:

FEDERAL HIGHWAY ADMINISTRATION

BY: _____ DATE: _____

TITLE: _____

NAVAJO NATION HISTORIC PRESERVATION DEPARTMENT

BY: _____ DATE: _____

TITLE: _____

UTAH STATE HISTORIC PRESERVATION OFFICER

BY:  DATE: Aug 22, 2007

TITLE: UHL SHPO

BUREAU OF INDIAN AFFAIRS

BY: _____ DATE: _____

TITLE: _____

INVITED SIGNATORY:

UTAH DEPARTMENT OF TRANSPORTATION

BY: _____ DATE: _____

TITLE: _____

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TITLE: _____

NAVAJO NATION HISTORIC PRESERVATION DEPARTMENT

BY: _____ DATE: _____

TITLE: _____

UTAH STATE HISTORIC PRESERVATION OFFICER

BY: _____ DATE: _____

TITLE: _____

BUREAU OF INDIAN AFFAIRS

BY:  DATE: AUG 29 2007

TITLE: _____

INVITED SIGNATORY:

UTAH DEPARTMENT OF TRANSPORTATION

BY: _____ DATE: _____

TITLE: _____

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BY: _____ DATE: _____

TITLE: _____

NAVAJO NATION HISTORIC PRESERVATION DEPARTMENT

BY: _____ DATE: _____

TITLE: _____

UTAH STATE HISTORIC PRESERVATION OFFICER

BY: _____ DATE: _____

TITLE: _____

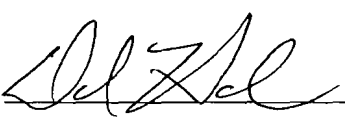
BUREAU OF INDIAN AFFAIRS

BY: _____ DATE: _____

TITLE: _____

INVITED SIGNATORY:

UTAH DEPARTMENT OF TRANSPORTATION

BY:  DATE: 9/10/07

TITLE: Region 4 Director

CONCURRING PARTIES:

UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION

BY: [Signature]

DATE: 7 Aug 07

TITLE: Director

HOPÍ TRIBE

BY: _____ DATE: _____

TITLE: _____

PAIUTE INDIAN TRIBE

BY: _____ DATE: _____

TITLE: _____

PUEBLO OF ACOMA

BY: _____ DATE: _____

TITLE: _____

PUEBLO OF JEMEZ

BY: _____ DATE: _____

TITLE: _____

PUEBLO OF LAGUNA

BY: _____ DATE: _____

TITLE: _____

PUEBLO OF ZIA

BY: _____ DATE: _____

TITLE: _____

Approved as to Form
Mark L. Shurtleff
ATTORNEY GENERAL

By: [Signature]

CONCURRING PARTIES:

UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION

BY: _____ DATE: _____

TITLE: _____

HOPI TRIBE

BY: _____ DATE: _____

TITLE: _____

PAIUTE INDIAN TRIBE

BY: Donna Martineau DATE: Sept. 6-07

TITLE: Cultural Resources

PUEBLO OF ACOMA

BY: _____ DATE: _____

TITLE: _____

PUEBLO OF JEMEZ

BY: _____ DATE: _____

TITLE: _____

PUEBLO OF LAGUNA

BY: _____ DATE: _____

TITLE: _____

PUEBLO OF ZIA

BY: _____ DATE: _____

TITLE: _____

PUEBLO OF ZUNI

BY _____ DATE: _____

TITLE _____

SOUTHERN UTE TRIBE

BY: _____ DATE: _____

TITLE: _____

UINTAH-OURAY UTE TRIBE

BY: _____ DATE: _____

TITLE: _____

UTE MOUNTAIN TRIBE

BY: _____ DATE: _____

TITLE: _____

WHITE MESA UTE COUNCIL

BY: _____ DATE: _____

TITLE: _____